ORIGINAL

No. 04-5286

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. 2255 ¶ 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or whether, instead, the limitations period begins to run on the date on which this Court or another court first holds that the relevant right applies retroactively to cases on collateral review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 365 F.3d 1273. The district court's order of dismissal (Pet. App. A2) is unreported, as is the report and recommendation of the magistrate judge (Pet. App. A3) on which the district court relied.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2004. The petition for a writ of certiorari was filed on July 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On June 25, 1993, petitioner was indicted in the United States District Court for the Southern District of Florida, for knowingly

and intentionally engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 2); conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. 1546(a) (Counts 4-19). After a jury trial, petitioner was found guilty on all counts except Count 3. Petitioner was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conviction on May 7, 1997. See United States v. Dodd, 111 F.3d 867 (11th Cir. 1997) (per curiam); Pet. App. A1 at 1275.

On April 4, 2001, petitioner filed a motion under Section 28 U.S.C. 2255. The district court dismissed the motion as time-barred, Pet. App. A2, and the court of appeals affirmed the dismissal. Pet. App. A1 at 1283-84.

1. Petitioner was a leader of a large Jamaican drug distribution network in New York City called the "Sprangler Posse." Gov't C.A. Br. 4.[1] In September 1988, Audley Antonio and Ainsley Brown were arrested in Mississippi transporting more than $500,000 in U.S. currency hidden in their vehicles. The cash was destined for delivery to Manley Cargill, who was a source of cocaine for the Sprangler Posse. Id. at 3-4. At trial, the government called five witnesses who were actively involved in the Sprangler Posse in the

[1] "Gov't C.A. Br." refers to the government's brief in the initial appeal of petitioner's conviction, in United States v. Dodd, No. 95-4978.

1970s and 1980s. Their testimony demonstrated that the Posse sold both marijuana and cocaine in Manhattan at least until the late 1980s, and that petitioner was one of the organization's leaders.

For example, Antonio testified that he was recruited into the drug operation by petitioner in 1986, and that his responsibilities increased from counting money, to delivering small quantities of marijuana within New York City, to traveling with petitioner to Florida to buy cocaine. Gov't C.A. Br. 5-6. Neville Pedro bought small amounts of marijuana from petitioner, then began buying marijuana from him in 30- to 60-pound bundles, and eventually was transporting as much as 500 to 1000 pounds at a time from Florida for delivery to petitioner. Id. at 12. Other members of the Sprangler Posse testified that they bought marijuana and cocaine from petitioner for resale. Id. at 13-14. In addition, an INS agent testified that petitioner had traveled in and out of the United States more than 35 times with a passport that had a false name and false date of birth. Id. at 16.

2. Petitioner appealed his conviction, challenging certain statements made by the prosecutor and by a government witness and arguing that he should have received an adjustment for acceptance of responsibility. On May 7, 1997, the court of appeals affirmed the conviction and sentence. See United States v. Dodd, 111 F.3d 867 (11th Cir. 1997) (per curiam). Petitioner did not file a petition for a writ of certiorari, and his conviction therefore became final on August 6, 1997, when the time for filing such a petition expired. Pet. App. A1 at 1275.

3. On June 1, 1999, this Court decided Richardson v. United States, 526 U.S. 813 (1999), which held that the CCE statute requires unanimous jury agreement on the predicate drug violations that compose the continuing series necessary for conviction.

4. On April 4, 2001, more than three years after his conviction became final and nearly two years after this Court's decision in Richardson, petitioner filed a motion under Section 2255, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that it had to reach unanimous agreement on the drug violations that composed the CCE. The government argued that petitioner's claim was time-barred, because it was filed beyond the one-year limitations period set forth in 28 U.S.C. 2255 ¶ 6, which provides:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Petitioner responded that the motion was timely because it was filed

within a year of this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), and also noted that the motion was based in part on Richardson. Pet. App. A3 at 2. In addition, he argued that the limitations period should be equitably tolled because he had been transferred to another facility during that time period. Id. at 2-3.

The district court, adopting the reasoning of the magistrate judge's report and recommendation, rejected those arguments and dismissed the motion as time-barred. Pet. App. A2. The court concluded, first, that the Eleventh Circuit had held, in McCoy v. United States, 266 F.3d 1245, 1259 (2001), that Apprendi does not apply retroactively to cases on collateral review; second, that Richardson had been decided more than one year before petitioner filed his Section 2255 motion, which was therefore outside the limitations period; and third, that petitioner had not demonstrated the extraordinary circumstances that would justify equitable tolling. Pet. App. A3 at 3-4.

5. The court of appeals affirmed the dismissal. Pet. App. A1.

a. On appeal, petitioner contended, inter alia, that the one-year limitations period defined in 28 U.S.C. 2255 ¶ 6(3) did not begin to run until April 19, 2002, the date on which the court of appeals decided Ross v. United States, 289 F.3d 677 (11th Cir. 2002), cert. denied, 537 U.S. 1113 (2003), which held that the rule announced in Richardson applied retroactively to cases on collateral review. Pet. App. A1 at 1276. The government disagreed, arguing that the limitation period began to run on the date this Court

decided Richardson. The court of appeals, while acknowledging a circuit split on the question, agreed with the government's position. Id. at 1277.

As a preliminary matter, the court of appeals noted that it had already held that Richardson established a newly created right within the meaning of 2255 ¶ 6(3), and that the right is retroactively available on collateral review. Pet. App. A1 at 1278 (citing Ross). The court also correctly noted that "[n]either party contends that 2255(3) requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so." Ibid.

Turning to the question of when the limitations period begins to run, the court noted that "the statute provides that the limitations period begins to run on the date on which the right asserted was initially recognized by the Supreme Court." Pet. App. A1 at 1279 (quoting Triestman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997)). The court found that "[t]here is no reason to read the unambiguous term 'initially' as signifying anything other than its common-sense and ordinary meaning of 'from the beginning.'" Ibid.

The court of appeals then addressed "the purpose of the qualifying clause that follows: 'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.'" Pet. App. A1 at 1279 (quoting 28 U.S.C. 2255 ¶ 6(3)). The court reasoned that "[i]t would not be logical for Congress to have enacted a strict one-year time limitation and then qualified that time frame by reference to

ambiguous events." Ibid. Instead, the court concluded that the clause "simply reiterat[es] the obvious": that Section 2255 ¶ 6(3) "provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review." Thus, the court found, the second clause in Section 2255 ¶ 6(3) "qualifies the right asserted -- not the time limit." Ibid. The court of appeals concluded:

> If Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from ... the date on which the right asserted was initially recognized by the Supreme Court...." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says.

Id. at 1279-1280.

DISCUSSION

Petitioner contends (Pet. 5-8) that this Court's review is warranted to resolve a conflict in the circuits on the question whether the one-year limitations period in 28 U.S.C. 2255 ¶ 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or, instead, on the date on which a court holds that the relevant right applies retroactively to cases on collateral review. The government agrees that there is a circuit conflict, and that the conflict is unlikely to dissipate through further consideration of the issue in the courts of appeals. Furthermore, the frequency with which the courts of appeals have had to address the issue confirms that it is a recurring one.

Therefore, although the government agrees with the court of appeals' resolution of the question presented in this case, the petition for a writ of certiorari should be granted.[2]

1. The Eleventh Circuit's holding in this case that the limitations period begins to run on the date on which the right asserted is initially recognized by this Court was also adopted by the Fifth Circuit in United States v. Lopez, 248 F.3d 427, 432-433, cert. denied, 534 U.S. 898 (2001). In Lopez, as in the present case, the prisoner challenged his conviction by relying on the rule of Richardson. The Fifth Circuit noted that Section 2255 provides that the limitations period "runs for one year from 'the date on which the right asserted was initially recognized by the Supreme Court.'" 248 F.3d at 432 (quoting 28 U.S.C. 2255 ¶ 6(3)). The court concluded that "[t]he better interpretation of when a right is initially recognized is one that commences the limitations period on the date the Supreme Court acknowledges the right." Id. at 432.

The Second and Eighth Circuits have expressed agreement with that position. In Nelson v. United States, 184 F.3d 953 (8th Cir.),

[2] The Eleventh Circuit and other circuits have held that Richardson v. United States, 526 U.S. 813 (1999), should be applied retroactively on collateral reivew to cases that had become final before Richardson was decided. Pet. App. A1 at 1278 (citing cases). The government has consistently taken the position that Richardson should not be applied retroactively because it does not "alter[] the range of conduct or the class of persons that the law punishes," Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004), and does not otherwise come within an exception to the rule of Teague v. Lane, 489 U.S. 288 (1989). This case does not present any question concerning the retroactivity of Richardson, however, because the court of appeals ruled that petitioner's Section 2255 motion was untimely on the ground that it was filed more than one year after Richardson was decided, and that holding would remain regardless of the retroactivity of Richardson.

cert. denied, 528 U.S. 1029 (1999), the Eighth Circuit held that this Court's decision in Old Chief v. United States, 519 U.S. 172 (1997), is not retroactive to cases on collateral review under paragraph 6(3), and that the prisoner in that case therefore could not rely on paragraph 6(3) to support the timeliness of his Section 2255 motion raising an Old Chief claim. In reaching that conclusion, the court of appeals framed the analysis in this way:

> If the right is both newly recognized and operates retroactively, the Supreme Court's decision conferring that right may offer an avenue for 2255 relief. In such a case, the statute of limitations for habeas corpus relief expires one year following the decision.

Nelson, 184 F.3d at 954 (emphasis added). In Treistman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997), the Second Circuit similarly noted, in dicta, that "the limitations period begins to run on 'the date on which the right asserted was initially recognized by the Supreme Court' 28 U.S.C. 2255 (emphasis added), which may be different from the date on which the right is later made retroactively available to cases on collateral review."

Four circuits, however, have reached contrary holdings. In United States v. Lloyd, 188 F.3d 184 (3d Cir. 1999), the prisoner's Section 2255 motion challenged his sentence in light of this Court's decision in Bailey v. United States, 516 U.S. 137 (1995). Although the prisoner's motion was filed more than two years after Bailey, the Third Circuit deemed it timely. The court explained that it was timely because it was filed within one year of Bousley v. United States, 523 U.S. 614 (1998), and United States v. Davis, 112 F.3d 118 (3d Cir. 1997), in which the rule in Bailey was held

retroactively applicable to cases on collateral review by this Court and by the court of appeals, respectively. See Lloyd, 188 F.3d at 188. The court concluded that it need not decide which court had to make a right retroactively applicable in order for it to be available under Section 2255 ¶ 6(3), because the petition in Lloyd "was timely under either rule." Ibid. The court accordingly adopted the position that the one-year limitation period under paragraph 6(3) begins to run on the date of a holding that the right asserted is retroactive -- not the date on which this Court initially recognizes the right.

The Ninth Circuit reached the same conclusion in United States v. Valdez, 195 F.3d 544 (1999), which also involved a claim resting on Bailey. The government asserted that the petition, filed more than 20 months after Bailey, was untimely, but the court of appeals rejected that argument, stating that it "ignores the second requirement of the provision -- that the right have been made retroactively applicable to cases on collateral review." Valdez, 195 F.3d at 547 (internal quotation marks and citation omitted). Expressly disagreeing with the Second Circuit's statement in Triestman, see 195 F.3d at 548 n.8, the court "conclude[d] that the one-year period of limitation under § 2255 [¶ 6](3) began to run on May 18, 1998, the date Bousley was decided" by this Court. 193 F.3d at 548. On that basis, the court held that the prisoner's Section 2255 motion, which was filed before Bousley was decided, was timely. Id. at 548.

In Ashley v. United States, 266 F.3d 671 (2001), the Seventh

Circuit reversed a district court decision that had dismissed a claim raised on collateral review based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The district court had reasoned that "until the Supreme Court itself declares that a new decision applies retroactively on collateral review, subparagraph (3) does not open a new filing window for prisoners." Ashley, 266 F.3d at 672. The court of appeals disagreed and held that, for initial Section 2255 motions, "[d]istrict and appellate courts, no less than the Supreme Court, may issue opinions" holding that a Supreme Court decision is retroactively applicable to cases on collateral review. Id. at 673. The court then stated that "[t]he one year to file under 2255 ¶ 6(3) begins, not on the date of the Supreme Court's decision newly recognizing a constitutional right, but on the date that decision is 'made' retroactive." 266 F.3d at 673. Because the court of appeals had not yet decided whether Apprendi was retroactively applicable, the court held, the limitations period had not yet begun to run.[3] Cf. In re Vial, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) ("Vial's assertion of a claim based upon a new rule of law implicated clause (3) of the limitation provision. And, since the Supreme Court has not yet ruled on the collateral availability of the rule in Bailey, the limitations period has not yet begun to

[3] In its later decision in Fischer v. United States, 285 F.3d 596 (2002), cert. denied, 537 U.S. 1114 (2003), the Seventh Circuit followed Ashley in a case arising from a Section 2255 motion raising a Richardson claim. The court explained that in Ashley, it had "held that the clock began to run once [the Seventh Circuit] declared a decision to apply retroactively," and because the prisoner's Section 2255 motion was filed before the date the Seventh Circuit held that Richardson was retroactive, it was timely filed. Id. at 600.

run.").

Finally, in Pryor v. United States, 278 F.3d 612 (2002), the Sixth Circuit joined those circuits in concluding that a motion is timely when it is filed within one year of a decision holding that the rule asserted is retroactively available to cases on collateral review. The prisoner in Pryor had filed a Section 2255 motion raising a Bailey claim in 1998, three years after this Court decided Bailey. Like the Seventh Circuit in Ashley, the court of appeals in Pryor was concerned primarily with the question whether the retroactivity determination could be made by the lower courts or only by the Supreme Court. The court concluded that it need not decide that issue, however, because "the Sixth Circuit had not decided whether Bailey was retroactively applicable to cases on collateral review" before the Supreme Court's decision in Bousley, and the prisoner's Section 2255 motion, which "was filed within one year of the Bousley decision, * * * was therefore timely." 278 F.3d at 616.

2. The division in the courts of appeals is not likely to be resolved without intervention by this Court.[4] Moreover, the one-year limitations period under 28 U.S.C. 2244(d)(1)(C) for state prisoners to file federal habeas petitions is almost identical to Section 2255 ¶ 6(3), and resolution of the question presented is therefore likely to have an affect on habeas petitions filed by

[4] Two circuits have noted the conflict, but have not themselves taken a position on the correct understanding of Section 2255 ¶ 6(3). See Sepulveda v. United States, 330 F.3d 55, 64 n.5 (1st Cir. 2003); Haugh v. Booker, 210 F.3d 1147, 1150 (10th Cir. 2000).

state prisoners as well. See In re Hearn, 376 F.3d 447, 456 n.11 (5th Cir. 2004). Restoring uniformity to the interpretation of a federal law is a valid basis for this Court to exercise its discretion to grant a petition for a writ of certiorari. See Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2004

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES** by email and first-class mail, postage prepaid, this **20th day of October 2004**.

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Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

04-5286
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